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## Handbook on the Law of Remedies

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trial judges are authorized to require special verdicts from the jury.<sup>41</sup> The decision does not address itself to problems of actual procedure that may arise in the application of comparative negligence, but rather grants to the trial courts "broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion."<sup>42</sup>

The questions remaining now appear to be ones of practical application. How well will the courts succeed in the new task of fairly apportioning damages? Will the "pure" form of comparative negligence prove workable in Florida or will the court perhaps have to consider adopting one of the modified approaches that prevail in other comparative negligence states? Whatever the answers may be, the main problem has been met: contributory negligence as a bar survives no longer. The court has taken a major step toward the perfection of a more just and equitable system of compensation in Florida.

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**Criminal Law—CONFESSIONS—PROBABLE CAUSE—CONFESSION OBTAINED AFTER ILLEGAL SEARCH AND SEIZURE ADMISSIBLE IF VOLUNTARY AND MADE AFTER MIRANDA WARNINGS GIVEN; INFORMATION INSUFFICIENT TO CONSTITUTE PROBABLE CAUSE TO SEARCH RESIDENCE MAY CONSTITUTE PROBABLE CAUSE TO SEARCH VEHICLE.—*Jetmore v. State*, 275 So. 2d 61 (Fla. 4th Dist. Ct. App. 1973).**

A passer-by reported to the police that a breaking and entering was in progress at a food store. The police dispatcher made radio contact with Officer Robert Anderson, who was patrolling the area, and informed him of the reported activity. Anderson was instructed to proceed to the food store and to secure the area. While in route to the food store Anderson encountered an automobile, driven by defendant Jetmore, traveling at a high rate of speed in the direction of the city limits. Anderson stopped the defendant, informed him that a breaking and entering was being investigated, and ordered him to get out of the car and to place his hands on the roof of the car. As the defendant did

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41. 280 So. 2d at 439. The special verdict can be used by the jury to determine the percentage of negligence attributable to each party and also the amount of damage sustained by each party. The court would then compute the proper amount of recovery, if any, for the plaintiff. The absence of such "special verdicts" in Mississippi has been criticized as a major fault in its "pure" form system because it has proven difficult to determine whether juries are basing recovery on percentage of fault or on percentage of damage. See generally Annot., 32 A.L.R.3d 463, 475-476 (1970); Heft & Heft, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933 (1972).

42. 280 So. 2d at 440.

so, Anderson noticed that he was trying to conceal a key in the palm of his hand. When he ascertained that the key was to the trunk of the defendant's auto, Anderson asked for, and was refused, permission to search the trunk. He searched it anyway and found food from the store in question. Defendant was then arrested and taken to the police station where he was given the *Miranda* warnings and where, approximately forty-five minutes after his arrest, he signed a confession. Jetmore later testified that he confessed because he had concluded that "the police had sufficient evidence to convict him anyway."<sup>1</sup>

Prior to trial the defendant filed two motions to suppress evidence. First, he moved to suppress the tangible evidence seized from the trunk of his automobile on the ground that the search and seizure was illegal. Secondly, he moved to suppress his confession on the ground that it was a fruit of the illegal search and arrest. The trial court granted the motion to suppress the tangible evidence, but ruled that the confession was admissible.

On appeal by the defendant,<sup>2</sup> the Fourth District Court of Appeal, in an opinion written by Chief Judge Reed, assumed that the arrest and search were illegal, but nevertheless affirmed on the ground that "the trial court had a factual basis before it from which it could reasonably have found that defendant's [confession] was the result of a voluntary exercise of free will and independent of the illegal search and seizure."<sup>3</sup> The court also held, in the alternative, that the information possessed by Officer Anderson "quite reasonably could be considered to have constituted probable cause for a search of the vehicle for stolen goods"<sup>4</sup> even though that same information "might not have been sufficient to equate with the 'probable cause' necessary to search a residence or a business premises . . . ."<sup>5</sup> Based on this assumption of sufficient probable cause, the court concluded that the search was lawful and, therefore, could not have provided an illegal inducement for the confession.

The decision in *Jetmore* raises two questions of interest: (a) whether intervening *Miranda* warnings can "purge" from a subsequent confession the "taint" of prior illegal police conduct; and (b) whether the quantum of probable cause necessary to support the warrantless search of a vehicle is less than the quantum of probable cause required to support the search of a building.

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1. 275 So. 2d at 63.

2. The state did not cross-appeal or otherwise challenge the trial court's decision to suppress the tangible evidence. *Id.* at 66 (Walden, J., dissenting).

3. *Id.* at 64.

4. *Id.*

5. *Id.*

## A.

Defendant Jetmore relied on the case of *Wong Sun v. United States*<sup>6</sup> to support his contention that the confession should be excluded as a "fruit of the poisonous tree"; i.e., that the confession was directly induced by the illegal search and seizure.<sup>7</sup> The district court of appeal, however, also relying on language from *Wong Sun*, found that the circumstances surrounding Jetmore's confession did not require application of the "fruit of the poisonous tree" exclusionary rule.<sup>8</sup>

*Wong Sun* is the major United States Supreme Court treatment of the matter of confessions that result from illegal police conduct.<sup>9</sup> The test of admissibility was set forth in *Wong Sun* as follows: "[T]he . . . question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"<sup>10</sup> In

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6. 371 U.S. 471 (1963).

7. See, e.g., *id.* at 485: "[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the intrusion."

8. 275 So. 2d at 64. The *Jetmore* court quoted the following passages from *Wong Sun*: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." 371 U.S. at 487-88. "On the evidence that *Wong Sun* had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" *Id.* at 491.

9. Fourth amendment protection was originally extended to prohibit collateral use of illegally seized evidence in the case of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In *Silverthorne* a district attorney was prohibited from using information obtained from illegally seized books and papers to support the later issuance of otherwise valid subpoenas for the same books and papers. Mr. Justice Holmes, writing for the majority, said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392. Justice Holmes recognized, however, that this principle requires exclusion of evidence only so long as the source of the evidence is illegal government activity: "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an *independent source* they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.* (emphasis added).

*Nardone v. United States*, 308 U.S. 338 (1939), added a further limitation on the extent of exclusion under the "fruit of the poisonous tree" doctrine, by stating: "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become *so attenuated as to dissipate the taint.*" *Id.* at 341 (emphasis added).

In *Wong Sun* the Supreme Court extended *Silverthorne* and *Nardone* to exclude verbal evidence which derives "immediately from an unlawful entry and an unlawful arrest." 371 U.S. at 485; see note 7 *supra*.

10. 371 U.S. at 488.

*Wong Sun*, one suspect (Wong) had been released on his own recognizance and had voluntarily returned several days later to confess. Although Wong's original arrest was found to be illegal, it was held that his confession had been obtained through his own voluntary action and that any "connection between the arrest and the [confession] had 'become so attenuated as to dissipate the taint.'"<sup>11</sup> Another suspect (Toy) had been questioned in his bedroom shortly after the police had made an illegal entry and arrest. In Toy's case the Supreme Court held that any statements made by him were to be excluded as not "sufficiently an act of free will to purge the primary taint of the unlawful invasion."<sup>12</sup>

The problem facing the *Jetmore* court, in its determination of the admissibility of the defendant's confession, was whether the point of sufficient "attenuation" had been reached. In its opinion the court recognized that the admissible confession in *Wong Sun* had been rendered "several days later,"<sup>13</sup> whereas there was only a forty-five minute span between *Jetmore's* arrest and his confession. Nevertheless, the court concluded that the confession was admissible because it "was quite obviously given freely and voluntarily and after a full and complete *Miranda* warning which the defendant expressly stated he understood."<sup>14</sup>

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11. *Id.* at 491; see note 8 *supra*.

12. 371 U.S. at 486.

13. 275 So. 2d at 64.

14. *Id.* at 64. *Miranda v. Arizona*, 384 U.S. 436 (1966), established that certain procedural prerequisites must be complied with by the police in order to preserve the fifth amendment prohibition against compelled self-incrimination. In general, if the warnings set forth in *Miranda*, or their acceptable equivalent, are not given to a suspect who is in police custody, no statement he makes can be considered the product of a free choice. *Id.* at 458. *Miranda* implies that confessions obtained without these procedural safeguards are inadmissible because they are involuntary:

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. . . . The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

. . . Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

*Id.* at 457-58. But if the *Miranda* Court intended to redefine for all purposes the definition of "voluntariness," this result was undone in *Harris v. New York*, 401 U.S. 222 (1971). The Court in *Harris* referred to statements obtained in the absence of *Miranda* safeguards as "inadmissible" rather than "involuntary"—and the Court limited the inadmissibility aspect of such statements to the prosecution's case in chief only, provided that "the trustworthiness of the evidence satisfies legal standards [including voluntariness]." *Id.* at 224. The defendant in *Harris* made "no claim that the statements made to the police [in the absence of *Miranda* warnings] were coerced or involuntary." *Id.* (emphasis added). The defendant nevertheless argued that absence of *Miranda* warnings precluded use of his

The court cited two cases in support of its conclusion: *Reynolds v. State*<sup>15</sup> and *State v. Oyarzo*.<sup>16</sup> In *Reynolds*, a brief per curiam opinion in which the facts are not reported, the Third District Court of Appeal held that "the adequacy of . . . [Miranda] warnings given [a] defendant . . . and . . . the voluntariness of his confession"<sup>17</sup> are issues to be resolved by the trial court. The *Oyarzo* case is a more convincing precedent than *Reynolds* because it presents facts on point with *Jetmore*. In *Oyarzo* the Florida Supreme Court held that even if a first set of *Miranda* warnings given the defendant had been vitiated by contemporaneous police misconduct (an assurance of "nothing to fear"), a second set of warnings, given two hours later by a different officer, was sufficient to render the defendant's confession voluntary.<sup>18</sup> In view of the reliance it places on *Oyarzo*, it is apparent that the *Jetmore* court gave substantial weight to the effect of the *Miranda* warnings as insulating *Jetmore's* confession from the taint of the prior illegal search.<sup>19</sup>

The court did not explicitly consider what the necessary elements of a free will confession are in the case of a confession that has been preceded by illegal police conduct.<sup>20</sup> In terms of the spatial and tem-

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statements even for impeachment purposes. The Court rejected this argument, adding: "The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution." *Id.* at 225 n.2 (emphasis added). Thus at least for collateral uses such as impeachment, and perhaps even in regard to the prosecution's case in chief, a failure to observe the *Miranda* safeguards does not preclude a determination that such statements are "voluntary." In regard to the prosecution's case in chief, *Miranda* would simply raise an additional hurdle for such statements to be admissible.

15. 222 So. 2d 246 (Fla. 3d Dist. Ct. App. 1969).

16. 274 So. 2d 519 (Fla. 1973).

17. 222 So. 2d at 246.

18. 274 So. 2d at 520.

19. In *French v. State*, 198 So. 2d 668 (Fla. 3d Dist. Ct. App. 1967), defendants were arrested following an illegal police search of their persons which revealed stolen property. The defendants confessed "within a very short time of the unlawful search and seizure." *Id.* at 669. The confessions were suppressed. The dissent in *Jetmore* concluded that the only distinguishing factor between *French* and *Jetmore* was that in *French* there was no indication that the defendants had been given *Miranda* warnings. 275 So. 2d at 67.

20. A general standard for determining voluntariness of a statement was formulated in *Bram v. United States*, 168 U.S. 532, 549 (1897), as follows:

The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influence he would have remained silent.

This standard was reaffirmed by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 462 (1966).

poral separation between the illegal search and the confession, it is clear that Jetmore's confession, when compared to the facts in *Wong Sun*, more resembles the inadmissible statement of Toy than the admissible statement of Wong. Since Jetmore was never out of police custody, there was no spatial separation to insulate him from the effects of the illegal search. It also seems unlikely that the temporal factor, the forty-five minute span between Jetmore's arrest and his confession, was highly significant.<sup>21</sup> It therefore seems implicit in the court's decision that the intervention of the valid *Miranda* warnings was, on the facts of the case, the primary factor in finding that the confession was voluntary and, consequently, that the nexus between the illegal search and the confession had been sufficiently attenuated.<sup>22</sup>

It is unfortunate that the court did not delineate more clearly the weight *Miranda* warnings are to be given in the context of insulating a confession from prior illegal police conduct.<sup>23</sup> It seems likely that the court will eventually have to confront a situation where a confession follows an illegal search after a still shorter interval than that in *Jetmore*, or where the search, *Miranda* warnings and confession occur in immediate succession.<sup>24</sup>

Logical extension of the reasoning in *Jetmore* would result in a rule that *Miranda* warnings in themselves can purge the taint of virtually contemporaneous police misconduct.<sup>25</sup> One of the more important situations to which such a rule would apply is that in which police confront a suspect with illegally seized evidence,<sup>26</sup> impress upon

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21. See note 19 *supra*.

22. For a contrary view, minimizing the importance of *Miranda* warnings where a defendant has been confronted with illegally obtained evidence, see *People v. Johnson*, 450 P.2d 865, 870-71, 75 Cal. Rptr. 401, 406-07 (1969), stating:

The *Miranda* warnings advise a defendant of his rights to remain silent and to counsel. They do not advise him whether the evidence he is confronted with is unlawfully obtained or whether it will be admissible at trial.

There is little, if any reason, to assume that the *Miranda* warning neutralizes the inducement to confess furnished by the confrontation of the defendant with the illegally obtained evidence which shows his guilt and the futility of remaining silent. If *Miranda* warnings were held to insulate from the exclusionary rule confessions induced by unlawfully obtained evidence, the police would be encouraged to make illegal searches in the hope of obtaining confessions after *Miranda* warnings even though the actual evidence seized might later be found inadmissible.

23. See *id.* at 877-78, 75 Cal. Rptr. at 413-14, where the dissent would hold that valid *Miranda* warnings in themselves provide the required "break in the causal chain" linking the illegality and the confession.

24. It is arguable that *Jetmore* itself is a step in this direction; the effective "attenuation interval" has been shortened from the two hour span in *State v. Oyarzo*, 274 So. 2d 519 (Fla. 1973), to the forty-five minute interval in *Jetmore*.

25. See note 23 *supra*.

26. On the issue of confronting a suspect with illegally obtained evidence see *French v. State*, 198 So. 2d 668, 669 (Fla. 3d Dist. Ct. App. 1967): "Statements made by a de-

him the futility of his situation,<sup>27</sup> give *Miranda* warnings and then hope for a confession.<sup>28</sup> If *Miranda* warnings, which were originally devised to "dispel the compulsion inherent in custodial surroundings,"<sup>29</sup> are eventually held to insulate, automatically, a confession from the coercive effects of such a confrontation with illegally seized evidence,<sup>30</sup> the police may be "encouraged to make illegal searches in the hope of obtaining confessions after *Miranda* warnings even though the actual evidence seized might later be found inadmissible."<sup>31</sup> Thus the rationale of *Jetmore*, if extended, may lead to an erosion of the

defendant when confronted by the police with the fruits of an illegal search constitute 'the fruit of the poisonous tree' and are inadmissible in evidence." In *French* no *Miranda* warnings had been given to the defendant. See note 19 *supra*. There is dictum in *Fahy v. Connecticut*, 375 U.S. 85, 90-91 (1963), to the effect that a confession induced by confrontation with illegally seized evidence would be tainted and excludable. *Fahy* was decided before *Miranda v. Arizona*.

27. On the issue of police "pressure" exerted on a suspect see *Paramore v. State*, 229 So. 2d 855, 858 (Fla. 1969):

A confession of guilt freely and voluntarily made is not rendered inadmissible because it appears to be induced . . . by the accused being told it would be easier on him if he told the truth . . . or by an officer's statement that only by confessing could the defendant escape the death penalty.

Cf. *State v. Kitashiro*, 397 P.2d 558, 566 (Hawaii 1964):

Thus the illegally seized automobile parts were used to instill in defendant a realization of the hopelessness of his situation. He was left to meditate on it for about three hours, while the corrosive properties of the poison so instilled had their intended effect. We cannot agree with the State's contention that during this interval the taint of the illegal search and seizure became dissipated.

28. This may have been the sequence of events which gave rise to the confession in *Jetmore* itself. See 275 So. 2d at 66 (Walden, J., dissenting), where the following is quoted from the defendant's testimony at trial:

Q "What happened at the police station?

A "They kept asking me if I would make a confession and the one in plain clothes, one man in plain clothes, he told me that I might as well make a statement, they had the evidence on me, that there wouldn't be no need for me to hold out, now, they would convict me no matter what.

....

"... I come to the conclusion where they kept saying they had the evidence whether they made [a statement] or whether I made one or not, they still would convict me. I finally gave up."

29. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

30. Confrontation with *legally* seized evidence has been held not to render a confession involuntary. *State v. Smith*, 277 A.2d 481 (Me. 1971). As a practical matter, a suspect does not know whether evidence has been legally or illegally seized. Consequently, the psychological coercion exerted by a confrontation with illegally seized evidence should be no different from that exerted by a confrontation with legally seized evidence. In a situation where a suspect is confronted with illegally seized evidence, it may therefore be more theoretically proper to say that the *Miranda* warnings insulate the confrontation from the taint of the prior illegal police conduct, than to say that the warnings insulate the confession from the coercive effects of the confrontation.

31. *People v. Johnson*, 450 P.2d 865, 871, 75 Cal. Rptr. 401, 407 (1969).



deterrent function which the "fruit of the poisonous tree" exclusionary rule was originally designed to serve.<sup>32</sup>

### B.

The court in *Jetmore* held, in the alternative, that the original search was supported by sufficient probable cause and thus fell within the doctrine of *Carroll v. United States*.<sup>33</sup> The rule announced in *Carroll* was that the search of motor vehicles could take place without a warrant if "the seizing officer [has] reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . therein which is being illegally transported."<sup>34</sup> The *Carroll* Court found that the mobility which is characteristic of automobiles makes warrantless searches of them, if based on probable cause, reasonable in circumstances where a warrantless search of a dwelling would be unreasonable.<sup>35</sup>

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32. The primary rationale behind any exclusionary rule is deterrence of illegal government conduct which infringes on a suspect's constitutional rights. "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). However, two distinct lines of authority in regard to the "fruit of the poisonous tree" doctrine have been developed by state and lower federal courts that have interpreted *Wong Sun*. See Note, *Admissibility of Confessions Made Subsequent to an Illegal Arrest: Wong Sun v. United States Revisited*, 61 J. CRIM. L.C. & P.S. 207 (1970). The first line of authority emphasizes that the deterrent factor alone should dictate when the "fruit of the poisonous tree" exclusionary rule is to be applied. These cases would hold that all evidence, including confessions, obtained subsequent to illegal police conduct must be excluded. See, e.g., *Gatlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963); *People v. Johnson*, 450 P.2d 865, 75 Cal. Rptr. 401 (1969); *People v. Sesslin*, 439 P.2d 321, 67 Cal. Rptr. 409 (1968). The second line of authority after *Wong Sun* has emphasized that "voluntariness" and "causation" should dictate when the exclusionary rule is to be applied. These cases would admit a "voluntary" confession despite any prior police conduct. See, e.g., *United States v. Close*, 349 F.2d 841 (4th Cir.), cert. denied, 382 U.S. 992 (1965); *State v. Kitashiro*, 397 P.2d 558 (Hawaii 1964); *State v. Moore*, 166 S.E.2d 53 (N.C. 1969).

The *Jetmore* decision not only accepts "voluntariness" as the key to admissibility, but implies that the giving of *Miranda* warnings after illegal police conduct will virtually guarantee the "voluntariness" of the subsequent confession. The court does not consider the effect of such a rule on the deterrence rationale behind the "fruit of the poisonous tree" exclusionary rule.

33. 267 U.S. 132 (1925).

34. *Id.* at 156. The *Carroll* decision has been incorporated into Florida statutory law. FLA. STAT. § 933.19 (1971).

35. 267 U.S. at 153. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Supreme Court emphasized that the *Carroll* exception to the warrant requirement was based on the mobility which is characteristic of automobiles. The *Chambers* Court also "insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution." *Id.* at 50-51; see note 41 *infra*. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 458-60 (1971).

In *Cady v. Dombrowski*, 93 S. Ct. 2523 (1973), the Supreme Court observed that a

In *Jetmore* the trial court had granted the motion to suppress the tangible evidence obtained in the original search of the automobile.<sup>36</sup> The district court of appeal, on the other hand, ruled that the facts of the case revealed sufficient probable cause to support the search, by stating:

While the totality of the information in the officer's possession at this time might not have been sufficient to equate with the "probable cause" necessary to search a residence or a business premises, it quite reasonably could be considered to have constituted probable cause for a search of the vehicle for stolen goods.<sup>37</sup>

The appellate court did not detail the extent to which less probable cause will be accepted for the search of an automobile than for the search of a building. Probably no precise guidelines can be given.<sup>38</sup>

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warrantless search of an automobile by state officers may be justified on grounds other than the mobility characteristic. The Court remarked upon the difference in operations of federal and state officers in relation to automobiles. "The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." *Id.* at 2527. "[S]tate and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves." *Id.* at 2528. Local contact is often non-criminal in nature, involving activities such as accident investigations and supervision of abandoned vehicles. These activities, described by the Court as "community caretaking functions," *id.*, often require intrusion into areas such as the trunk of an automobile for the purpose of safeguarding the owner's property, guaranteeing the safety of the custodians, or protecting the immediate general public—any "one of the recurring practical situations that [result] from the operation of motor vehicles and with which local police officers must deal every day." *Id.* at 2530. This "extensive and often noncriminal contact with automobiles . . . [often] bring[s] local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband"; accordingly, "warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle being removed or evidence in it being destroyed were remote, if not nonexistent." *Id.* at 2528.

The *Dombrowski* Court thus defined a category of automobile intrusions that satisfies the fourth amendment standard of reasonableness without the existence of probable cause; but this category is limited to situations involving "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* The search of *Jetmore's* automobile, however, was admittedly made in the course of an investigation of a breaking and entering. 275 So. 2d at 63. And nowhere does the *Dombrowski* Court intimate that less probable cause is required for the warrantless search of an automobile on suspicion of criminal activity than is required for a similar search of residence or business premises. See note 41 *infra*.

36. 275 So. 2d at 62.

37. *Id.* at 64. On appeal the state did not challenge the trial court's ruling that the search was illegal. Recognizing this, Judge Walden stated in his dissent that the trial court's resolution of the issue of the legality of the search could not properly be "challenge[d], or change[d], or contort[ed] in some kind of effort to support the appealed trial court decision regarding the use of the confession." *Id.* at 66.

38. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 176 (1947), stating: "The troublesome line posed by the facts in the *Carroll* case and this case is one between mere

When determining whether a man of "reasonable caution" could have believed that an automobile was carrying contraband, it is clear that courts are influenced by the fact that automobiles are often used to commit crimes and by the fact that officers often will have only a fleeting chance to search an automobile.<sup>39</sup> In *Jetmore*, however, the court seems to go beyond the mere incorporation of these facts into the ultimate determination of probable cause, and by doing so, the decision may undermine the protection afforded by the *Carroll* requirement of probable cause to search. The rule which seems to be put forth in *Jetmore* is that a warrantless search of an automobile is legal where there is probable cause to search, even though the quantum of probable cause present is less than that required for the search of a building.<sup>40</sup> The introduction of this new element of "less probable cause" does not seem to be supported by United States Supreme Court discussions of the requirement of probable cause.<sup>41</sup>

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suspicion and probable cause. That line necessarily must be drawn by an act of judgment formed in the light of the particular situation and with account taken of all circumstances . . . ."

39. See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970). See Murray & Aitken, *Constitutional Limitations on Automobile Searches*, 3 LOYOLA U.L.A.L. REV. 95, 103-06 (1970), for examples of "suspicious behavior" which in California have been held to constitute sufficient probable cause to search an automobile.

40. Cf. *Cameron v. State*, 112 So. 2d 864, 873 (Fla. 1st Dist. Ct. App. 1959):

As a necessary and proper evolution of the living law to meet the changing needs of society, the modern trend of authority is to narrow the concept of immunity against searches and seizures when it involves a motor vehicle used as an aid to the commission of crimes, whether in transporting the criminal or the fruit of the crime. This trend is reflected by the acceptance of less compelling facts and circumstances than formerly required to constitute "probable cause" for an arrest of the driver or occupant, or for search of vehicles and seizure of property found therein without supporting warrants.

See also *State v. Miller*, 267 So. 2d 352 (Fla. 4th Dist. Ct. App. 1972). It is highly questionable whether this "trend" is supported by the decisions of the United States Supreme Court. See note 41 *infra*.

41. It is true that the Supreme Court has stated that in search and seizure cases the "Court has long distinguished between an automobile and a home or office." *Chambers v. Maroney*, 399 U.S. 42, 48 (1970). Such a distinction has been seized upon in some Florida cases to justify lowering the standard of probable cause required to search an automobile. See, e.g., *Cameron v. State*, 112 So. 2d 864, 873 (Fla. 1st Dist. Ct. App. 1959). In order to properly interpret the distinction made by the Supreme Court, however, it is necessary to recall that there are two general constitutional prerequisites for a valid search: the search must be supported by probable cause, and the search must be reasonable. U.S. CONST. amend. IV. Generally, a search must be supported by a warrant in order to be reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Ventresca*, 380 U.S. 102 (1965). In certain exigent situations, however, the Court has recognized that warrantless searches can be reasonable. *Coolidge v. New Hampshire*, *supra* (seizure of evidence in plain view); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest); *Warden v. Hayden*, 387 U.S. 294 (1967) (search while in "hot pursuit"); *Schmerber v. California*, 384 U.S. 757 (1966) (need to prevent destruction of evidence); cf. *Cady v.*

The decision in *Jetmore*, if followed, may cause two distinct lines of cases to develop: one defining "automobile-search probable cause" and another defining "probable cause generally." Given the inherent elusiveness of even the strictest conception of "probable cause," the introduction of a "lesser probable cause" standard in automobile cases may result in relaxation of that fundamental element of fourth amendment protection, thus leaving the highway traveler "at the mercy of the officers' whim or caprice."<sup>42</sup>

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Dombrowski, 93 S. Ct. 2523 (1973) (warrantless searches of automobiles reasonable in situations involving "community caretaking functions").

The *Carroll*-type automobile cases represent another one of these exigent situations. The issue in these cases is not whether less probable cause is necessary to search the vehicle, but whether the search can be valid *without a warrant*. Thus it is on the warrant issue, not on the probable cause issue, that the Supreme Court has distinguished between automobiles and buildings. "In terms of circumstances justifying a *warrantless* search, the Court has long distinguished between an automobile and a home or office." *Chambers v. Maroney*, 399 U.S. 42, 48 (emphasis added). "[S]earches of cars that are constantly movable may make the search of a car *without a warrant* a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property." *Cooper v. California*, 386 U.S. 58, 59 (1967) (emphasis added).

In no automobile case has the Court indicated that the exigent circumstances justify a lessening of the probable cause requirement. As stated in *Chambers v. Maroney*, 399 U.S. at 51: "In enforcing the Fourth Amendment protection against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement . . . . *Carroll* . . . holds a search warrant unnecessary where there is probable cause to search the automobile stopped on the highway." Or, as summarized in *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968):

Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office . . . . The cases so holding have, however, always insisted that the officer conducting the search have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search.

The *Carroll* Court itself, when defining probable cause, did not distinguish between the quantum of probable cause necessary in an automobile case and the quantum necessary in other cases. This is apparent from the fact that in framing its definition of probable cause the *Carroll* Court relied on cases "justifying seizures on land or sea, in making arrests without warrants for past felonies, and in malicious prosecution and false imprisonment cases." 267 U.S. at 161.

42. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). The full quotation reads as follows:

It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed, *Carroll v. United States*, . . .—must be measured by the facts of the particular case. The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice."

*Id.*

## BOOK REVIEW

HANDBOOK ON THE LAW OF REMEDIES. By Dan B. Dobbs.<sup>1</sup> St. Paul, Minn.: West Publishing Co. 1973. Pp. 1067. \$15.00. (Hornbook Series.)

*Reviewed by Lawrence C. George<sup>2</sup>*

One who is ill consults a doctor and is prescribed a remedy; improvement or recovery will only probably warrant the patient's attributing the change to the remedy. The patient (and the FDA in issuing the license for the chemical's prescription if a drug is involved) makes an inference, a leap of faith, in equating medical remedies with cures. Montaigne wrote that throughout most of the history of medical science no one but the most credulous fool would think of a "remedy" as a likely help, much less a cure.<sup>3</sup> The word's connotation was closer to the ideas still conveyed by such pejorative terms as "nostrum" and "panacea." Today a suitor who seeks from a member of the legal profession relief plainly promised by settled principles of decisional or statutory law is likely to have the same attitude about the efficacy and the cost of his legal "remedies" as Montaigne had about medical remedies four centuries ago—if he thinks of the term "remedy" at all in connection with his recourse to the courts.

Even within the legal profession there is a certain awkwardness about appropriating such a therapeutic term as "remedy" to the variety of relief sought in that part of the complaint aptly termed a prayer. Law is more a sundering than a healing art, and it seems disingenuous to steal the thunder of a sister profession, even if medicine's reputation is a windfall from recent progress in biochemistry.<sup>4</sup> But law's title to "remedies" is as strong and as old as medicine's. As a purely human and

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1. Professor, University of North Carolina School of Law.

2. Associate Professor, Florida State University College of Law.

3. "Who ever saw a doctor use the prescription of his colleague without cutting out or adding something? Thereby they clearly enough betray their art and reveal to us that they consider their reputation, and consequently their profit, more than the interest of their patients . . ." Montaigne, *Of the Resemblance of Children to Fathers*, in *THE COMPLETE WORKS OF MONTAIGNE* 584 (Frame transl. 1958). "If we were even assured that when they make a mistake it would not harm us, even though it did not benefit us, it would be a very reasonable bargain to risk acquiring some gain without putting oneself in danger of loss." *Id.* at 586.

4. Dean Sherman M. Mellinkoff, M.D., of the U.C.L.A. Medical School, writes: "At the beginning of the 20th century there were only about six reliable and effective pharmaceutical preparations, namely digitalis (still helpful in many kinds of heart disease), morphine, quinine (for malaria), diphtheria antitoxin, aspirin, and ether. Two other successful means of chemical intervention were also available: immunization against smallpox and rabies. This pharmacopoeia remained basically unchanged until about the time of World War II." Mellinkoff, *Chemical Intervention*, *SCIENTIFIC AM.*, Sept. 1973, at 103.

social artifact, law has the further claim that its remedies, in principle, could someday, somehow, in the real world become 100 percent effectual. Professor Dobbs does not need such a utopian jurisprudential stand, however, to justify his lucid and lively new Hornbook. He starts with a large, diversified basis of given data, amounting to little less than the entire set of *prima facie* cases that private litigants can set forth in the pursuit of legal damages or equitable relief (or, within the American scheme, some combination of the two), and he theorizes and analyses the choices available, keeping in view the historically determined variety of judicial responses. The subject of remedies is thus both comprehensive and complex almost beyond management of a single mind because it originates from a composite of doctrines, each of whose initial formulation occupies a large proportion of the mental energies of bench, bar and academy.

Remedies is a perplexing and protean subject for independent legal study, whether in a textbook or in a traditional legal curriculum. It has the desirable status of being residuary legatee of all the good intentions of the usual courses in trusts, equity, contracts, torts and the rest—a gathering place for the general principles that underlie the computation of monetary damages, for the historical principles that determine when other kinds of relief than monetary damages may be available, for the nitty-gritty of *per diem* or blackboard damages for pain and suffering, and for the sublime esoterica of the rule(s) that derive from *Clayton's Case*.<sup>5</sup> But this eclectic legacy causes remedies to suffer from an overbreadth that is evident in the enormous number of cross-referencing footnotes in Professor Dobbs' well-organized, cogent text. Even more, remedies suffers from complexity and imprecision. Student and teacher alike are forced unceremoniously to the realization that there is no legal penicillin. Every course of action is beset with serious side-effects: free choice becomes "an election," pursuit of one theory becomes a waiver of others, and estoppel becomes a pitfall to trap the weary convalescent just as he thinks the crisis is passed.

Members of the legal profession are commonly myopic. They often fail to see that from the viewpoint of the man in the street, the citizen Edmond Cahn called the "consumer" of justice,<sup>6</sup> "going to law" is a poor remedy. Only at substantial expense of both personal treasure and

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5. *Devaynes v. Noble*, 1 Mer. 572 (1816). The case is discussed most learnedly in McConville, *Tracing and the Rule in Clayton's Case*, 79 L.Q. REV. 388 (1963), reprinted and abridged in K. YORK & J. BAUMAN, REMEDIES 351-57 (1967). The McConville article, itself expository, is a difficult matter for most students, and Professor Dobbs performs an invaluable service in distilling its salient points and making the American progeny of the English case recognizable, if not entirely legitimate.

6. See E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN ch. 2 (1961).

peace of mind are the most sacred promises of the legal order made good. Surely one of the most remarkable features of the American law of remedies is its resolute refusal to consider legal fees part of the remedy to which prevailing clients are entitled. Professor Dobbs is not insensitive to this and similar (irremediable?) defects of civil litigation as a social institution.<sup>7</sup> Two of his text's greatest merits are the clarity of its explanations of the accidental and contingent sources of many of our troubles, and the persuasive arguments against such anachronistic survivals as the doctrine of "election of remedies."<sup>8</sup> Still, the battles that Professor Dobbs wages are always small, well-suited to the case-by-case approach of a legal system rooted in stare decisis and to the needs of a student or practitioner seeking information about a concrete point of "remedial" law.

But the rub comes when research is begun with a definite and key-numerable point of law in mind. Using Professor Dobbs' textbook is like consulting a dictionary in which every definition raises a new point requiring further definition until finally the entire dictionary is covered. There is something inescapably procrustean in the effort to deal with a field that is the intersection of a variety of fairly well-established legal doctrines. Remedies invites, and almost requires, theorizing about the meaning and role of the doctrines, of the formulations, and of the distillations that comprise such successful companion textbooks as *Prosser on Torts*.

This is of course a familiar complaint to anyone who has tried to unravel law's seamless web just far enough to isolate and resolve a discrete problem; the artificiality of categories also besets Prosser's established text, and it greatly complicates the American Law Institute's unending task of restatements. When these basic difficulties are compounded by the need to explain the whys and wherefores of choosing one doctrine over another, the advantage of a systematic approach to the common-law oriented American legal tradition is easily perceived. Professor Dobbs shows a mastery of the traditional, case-oriented, compile-and-comment method of legal exposition that marks him as a true virtuoso of the caliber of a Corbin or a Prosser. He obviously possesses

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7. See § 3.8, at 194, of the Hornbook and more particularly the balanced discussion of the arguments pro and con on the financing of litigation set forth in the subsection starting on p. 200, in which Professor Dobbs remarks: "It is ironic, to say the least, that such a motivation [the anti-lawyer attitude prevalent in colonial and revolutionary America] would result in making courts inaccessible, or at best, a losing enterprise for most Americans." The treatment of the economics of litigation is one of the most felicitous parts of the Hornbook, both for its scholarly level and for its careful and provocative assessment of the various ways counsel can include the costs of his services in the ultimate recovery without fully imposing that burden on his client.

8. The discussion is principally found in § 1.5 of the Hornbook.

a sound and comprehensive, but always implicit, jurisprudential theory that determines his criticism and his choice of sub-themes within the larger canvas unfortunately laid out by long tradition. What is wanted is a more open and tendentious avowal of the theories implicit in the treatment given the several issues and an organization that is more directly and unashamedly normative.

Philosophical criticism seems terribly misplaced in dealing with such a practical and unpretentious contribution to knowledge as a Hornbook, the function of which is to settle issues, not to raise them. It is instructive to examine a very small sample of the discussion of remedial problems in Professor Dobbs' text. The sample is chosen for typicality and excellence. The purpose of this excursion is to consider whether a subject as problematical, by definition, as remedies may suffer so far in the translation of leading cases into terms of purely legal doctrine as to deprive the text of practical usefulness either as a leader of judicial opinion or an elucidator of important policy issues.

A perennial problem of law occurring in most nonprimitive societies concerns the mendacious middleman. Professor Dobbs provides a model of scholarly edification, diffidence and brevity in discussing the most perplexing and amusing form of this problem in the contemporary United States. The discussion is found in a section titled "The Broker's Profit Cases" (pp. 686-89). It begins with a helpful schematic reduction of the issue to its minimal juridical elements: *P*, a principal with some real estate to sell; *A*, his agent (commonly known as broker); and *T*, a third party who wants to buy the property. The problem is not what *A* can get away with vis-à-vis his principal but rather how *A* can be made to deal fairly with *T* despite the principal's apparent satisfaction with a raw deal. Fine examples of the problem are found in the two fascinating cases of *Ward v. Taggart*<sup>9</sup> and *Harper v. Adametz*.<sup>10</sup> The briefing of these decisions in Dobbs' text is a perfect model of accuracy and brevity. Both pose the recurrent problem of an agent exploiting his inside information that the buyer will pay more (or take a smaller estate for the same price) and that the seller will take less than the ostensible terms of sale in order to conclude a bargain. Doctrinal difficulties arise in granting relief to a buyer who ends up with what he wanted at or below its fair market value. In the words of Professor Dobbs:

Although cases of this genre tend to speak in terms of "fraud," or, as in *Ward v. Taggart*, prevention of unjust enrichment, it seems

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9. 336 P.2d 534 (Cal. 1959).

10. 113 A.2d 136 (Conn. 1955).



clear that a duty is being imposed upon the broker who has inside information not to misdeal in it. If this is not a fiduciary duty in origin, it at least resembles such a duty in operation, since it requires both disclosure and the avoidance of personal profit. Perhaps the underlying policy is that a free market is desirable, and that a free market cannot work effectively without fair access to basic information. This coupled with the enrichment of the broker has been enough to tip the scales in favor of liability. [p. 687]

Amid all the diffidence and scholarly caution of the author's phraseology is a thesis—namely that these cases would be better understood if the courts rendering the decisions had spoken in traditional tort terminology. Courts should substitute the letter *F*, indicating a fiduciary capacity, for the letter *A*, at least as a description of the relationship between the buyer and the seller's agent. They should also say as well as mean that there is a duty to the buyer not to grab up the value of the margin between the buyer's top price and the seller's bottom one. There is a further proviso—the duty exists unless the deal between the seller and his *A* provided for the *A* to be paid whatever he could get out of the buyer over and above the net sale price wanted by the seller.

It would be more (legally) realistic to reduce the *Ward* and *Harper* cases to an even simpler conclusion—namely that a court will not let a broker get away with such chicanery; the injustice of the enrichment will outweigh any quibbles about who should be complaining. It is difficult to see how this very appealing gut reaction is further buttressed by policy talk about effectiveness of free markets and access to basic information. If the courts were to indulge policy debate in a case of first impression, resourceful advocates would surely build a great model of the virtues and benefits of the broker's role as *arbitrageur*. The whole idea that the scales are in near-equipose on the issue of liability and that the rather abstruse policy of promoting a free market is needed to resolve the issue is hard to reconcile with the decidedly colorful and moralistic reactions of the judges who rendered the decisions and with the heat these cases readily generate in classroom discussions. In both *Ward* and *Harper*, the broker was an arrant knave. Stronger examples of the law's acting as the enforcer of business morality are hard to find. The problem is therefore one of finding an acceptable way to rationalize the needed result in terms of the familiar categories and patterns of legal doctrine.

There are numerous avenues by which an acceptable rationalization can be arrived at. Justice Traynor appreciates the flexibility of the unjust enrichment doctrine, because it is otherwise hard to attribute a loss to the plaintiff who got full value for his money. Professor Dobbs

draws the lesson that is manifestly meant to be taught to tempted brokers everywhere: there is a duty to let the parties to a sale work out between themselves the balance between their respective willingnesses to make concessions. The result could also be rationalized as the consequence of a form of equitable substitution of the buyer for the unlitigious seller, thus limiting the buyer's claim to the amount of consideration paid that should have reached the seller's pockets. This might be a more promising way of reconciling the cases in which the buyer's claim is based on a simple misrepresentation of the seller's minimum price. The point here is that doctrinal analysis easily suggests a variety of legalistic methods that can be used to rationalize a morally happy result, and it is at best confusing to make such nice distinctions as are implied in Professor Dobbs' discussion of the relative importance of "fraud" or "unjust enrichment" as the best single stick with which to cudgel the thievish broker.

Confusion at the level of legal theory about why it is fair to make the broker disgorge his gains is certainly no disgrace, and it may be nothing more than a betrayal of a lack of sufficient subtlety on the part of the reader. A more serious source of disquietude is the premise from which Professor Dobbs launches his feats of juristic elegance. The premise—and the promise—of the careful dissection of cases like *Ward* and *Harper* is that the effort will be repaid in the form of a better understanding of the nature of "fraud" or "unjust enrichment." Implicit duties will become explicit and basepoints will be acquired for excursions to the murky regions of law's penumbras. The truth of the matter may be that if one is willing to pause for a few minutes and grope for a pretutored sense of fairness the eclipse will pass. A metaphorical way of talking comes naturally to a court that must put words around the conclusion (judgment for plaintiff buyer) at which it has little hesitation in arriving. The ultimate scheme for explicating the relationship between members of the eternal triangle of broker, seller and buyer may not emerge with algebraic clarity except by noting the "operational resemblance" between the duty recognized in the law of tort and the conduct expected of a real estate salesman concerned about losing a judgment or a license in the circumstances of the *Ward* and *Harper* cases. When it finally becomes clear, the legal response to the deplorable situation may seem banal and the effort used to reach it wasted. "A Broker must pay back to the Buyer everything he ends up with after the Closing except a fair commission from the Seller as agreed upon in Advance of the transaction" or the like may be the blackest letters reasonably capable of summarizing the ire and the lingering doubts about the penal consequences of a doctrine that would

conceivably leave the hitherto supine seller free to initiate a second action, on familiar agency principles, to recover once more from the scoundrel what he had already parted with to the third party. Had Mr. Harper of *Harper v. Adametz* not been the renowned Professor of Torts at Yale Law School perhaps Mr. Tesar, the seller, might have been aroused to seek the imposition of a constructive trust on the proceeds of that historic litigation, thereby settling many a riddle and theoretic doubt.

The artificiality of the foregoing discussion is a *reductio ad absurdum* of the method of textual analysis invited by the objective and the format of the Hornbook. The aim of these books is to simplify and identify elements having a common bearing on the proper decision of typical cases. In a technical, juristic sense, this aim is unrealistic. In a practical sense, too, there are grave risks of seeming to be pedantically naive in approaching the law's developments as if remedies did not have a paramount influence in the formulation of doctrines (with all that that implies about the judicial morality of ends and means) instead of approaching cases as if the settled principles determine the situation in which a remedy will be given. The lesson that emerges most clearly from an overview of the cases and from the authorities dealing with the subject is that remedies needs a more utopian, normative and systematic critique of what is expected and what is required from private law as it presently operates in this most legalistic of countries. Professor Dobbs seems eminently suited to the task, and it is hoped his future emendations of this valuable text will show more boldness as the authority of his readings becomes increasingly well-established.

Departure from the accepted genre of the Hornbook is particularly defensible for remedies because the only way to be practical in approaching the subject is to treat it as the area *par excellence* for considering the relevance of "purely" legal, formal, doctrinal (and to be honestly pejorative, doctrinaire) formulae of the kind exemplified in such authoritative monuments as the Restatements of the Law. Black letters belong in a study of remedies; indeed they bear more fundamentally on its subject matter than the doctrine of consideration, for example, bears on the study of contract—but that is all the better reason to adopt and scrupulously to maintain a certain careful attitude toward the black letters, a certain sophistication about the reasons for their parochial importance that is too easily compromised by following the established pattern of the Hornbook series.

On the whole, Professor Dobbs has managed supremely well the difficult task of telling all that we didn't know and were afraid to ask about the rule in *Clayton's Case* as well as about "the nature of" restitu-

tion as a fundamental juridical concept. It is exciting to see the birth of a textbook that fills needs so forthrightly and so comfortably as this Hornbook. Future editions will surely bring further refinements and some simplification of organization, but this edition will be memorable for establishing its author as the most prestigious proprietor of a very important and long-neglected field of legal study.